THE FEDERAL EMPLOYERS' LIABILITY ACT.*

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E. Constitutionality of Act.—Generally.—From the standpoint of power in congress under the interstate commerce clause of the constitution to deal with the relation of master and

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servant as between those carriers engaged in interstate commerce and those of their employees engaged in the same commerce, and to regulate the liability of the former for personal injuries sustained by the latter while both are engaged in that commerce, there can be no question as to the entire constitutionality of the Act of April 22, 1908, since the authoritative utterance of the Federal Supreme Court in the Second Employers' Liability Cases.[1] Prior to this decision, the constitutionality of the act as a valid exercise of the power to regulate interstate commerce had been maintained by a number of decisions rendered in the lower federal courts, and in the state courts of last resort.[2] And even the first act of June 11, 1906, which was afterwards declared to be an unwarranted interference with intrastate commerce, was held by numerous decisions not to be obnoxious in this respect.[3]

As Encroaching upon State Powers, Regulating Intrastate Commerce, etc.—As repeatedly stated, the original act of June 11, 1906, was declared invalid in the first Employers'

1. **Constitutionality of act, generally.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762.

2. **Same.**—State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686 (Sept. 29, 1908); Owens *v.* Chicago, etc., Ry. Co. (Minn.), 128 N. W. 1011; St. Louis, etc., R. Co. *v.* Conley (C. C. A.), 187 Fed. 949; Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893, 904; Walsh *v.* New York, etc., R. Co. (C. Ct. D. Mass. Oct. 26, 1909), 173 Fed. 494.

3. **Same—Act of June 11, 1906.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 308, 28 S. Ct. 141; Snead *v.* Central of Ga. R. Co. (C. Ct. S. D. Ga., E. D. March 25, 1907), 151 Fed. 608; Spain *v.* St. Louis & S. F. R. Co. (C. Ct. E. D. Ark., E. D. March 13, 1907), 151 Fed. 522; Kelley *v.* Great Northern R. Co. (C. Ct. D. Minn. 5th Div. Mar. 11, 1907), 152 Fed. 211; Plummer *v.* Northern Pac. R. Co. (C. Ct. W. D. Wash. N. D. Mar. 2, 1907), 152 Fed. 206; Lancer *v.* Anchor Line (Dist. Ct. S. D. N. Y. July 15, 1907), 155 Fed. 433.

Contra.—Howard *v.* Illinois, etc., R. Co. (C. Ct. W. D. Tenn. W. D. Jan. 1, 1907), 148 Fed. 997; Brooks *v.* Southern Pac. Co. (C. Ct. W. D. Ky. Dec. 31, 1906), 148 Fed. 986; Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co., 82 Conn. 373, 73 Atl. 762.

Liability Cases because not confined in its operation to interstate carriers and their employees while engaged in interstate commerce.[4] It is true that the opinion in that case was rendered by a greatly divided court. The division of opinion only extended, however, to the proper construction of the act, the majority being of the opinion that the act applied to all the employees and to the entire business of common carriers engaged in interstate transportation, even in part, and without regard to the nature of the business, as interstate or intrastate, which was being done at the time the injury was sustained; while the minority were of the opinion that, properly construed, the act did not embrace liability for any injuries other than those sustained by the employees of interstate carriers and while engaged in interstate commerce. But while the court was not united upon the proper construction of the act, all the justices were united upon the proposition that, if the construction announced by the majority was correct, and if the act did apply to all common carriers whose business was interstate commerce in whole or in part, without regard to the nature of the business that was being done at the time the injury was sustained, the legislation would necessarily include intrastate business, and would therefore transcend the power of congress.[5] And while it was intimated in that case that the valid and invalid portions of the act were so interblended that

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4. **As a regulation of intrastate commerce—Encroachment upon state powers; Act of June 11, 1906.**—Employers' Liability Cases, 207 U. S. 463, 53 L. Ed. 297, 28 S. Ct. 141.

Previous to this decision, the validity of the act, as not being obnoxious to the objection that it was an encroachment upon the domain of state powers and an attempt to regulate intrastate commerce, had been maintained by the following cases: Spain *v.* St. Louis & S. F. R. Co. (C. Ct. E. D. Ark., E. D. March 13, 1907), 151 Fed. 522; Snead *v.* Central of Ga. R. Co. (C. Ct. S. D. Ga., E. D. March 25, 1907), 151 Fed. 608; Plummer *v.* Northern Pac. R. Co., 152 Fed. 206; Kelley *v.* Great Northern Ry. Co., 152 Fed. 211.

Contra.—Brooks *v.* Southern Pac. Co. (C. Ct. W. D. Ky. Dec. 31, 1906), 148 Fed. 986;Howard *v.* Illinois, etc., R. Co. (C. Ct. W. D. Tenn. W. D. Jan. 1, 1907), 148 Fed. 997; Atchison, etc., R. Co. *v.* Mills, 49 Tex. Civ. App. 349, 108 S. W. 480.

5. **Same—Same—Same.**—Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Pedersen *v.* Delaware, etc., R. Co. (C. C.), 184 Fed. 737, 738.

the whole must fail, it was afterwards held that its invalidity, so far as interstate commerce was concerned, did not invalidate such of its provisions as attempted to regulate commerce within the District of Columbia and the territories.[6]

The present act of April 22, 1908, was drawn to meet the objection on which the first act was held to be invalid, and that it does not perpetuate the infirmities which rendered that act unconstitutional, but is a valid exercise of the power vested in congress, properly restricted to interstate carriers and their employees, and applicable only to those cases in which the employee was engaged in interstate commerce at the time the injury was sustained, is conclusively settled by the decision of the Federal Supreme Court in the Second Employers' Liability Cases.[7]

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6. **Same—Same—As to commerce in the District of Columbia and the territories.**—El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21. Contra: Atchison, etc., R. Co. *v.* Mills, 49 Tex. Civ. App. 349, 108 S. W. 480.

7. **Present act not invalid as attempting to regulate intrastate commerce.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

This decision reversed the decision of the Suprme Court of Errors of Connecticut in Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co., 82 Conn. —, 73 Atl. 762, in which it was held that the act was unconstitutional, not only in that it attempted to regulate intrastate commerce, but upon the further ground that the whole subject was one outside the power conferred upon congress by the interstate commerce clause of the constitution; that the provision forbidding contracts, rules and regulations exempting carriers from the liabilities imposed by the act was opposed to the due process clause of the Fifth Amendment; and that the provisions with respect to the distribution of the damages recoverable, being inconsistent with the laws of the several states as to the devolution of the estates of deceased persons, was unconstitutional as an invasion of the right of the states to legislate upon that question and to prescribe the duties of executors and administrators.

Other cases sustaining the validity of the act on this point are as follows: Zikos *v.* Oregon, etc., R. Co. (C. C.), 179 Fed. 893; Pedersen *v.* Delaware, etc., R. Co. (C. Ct. E. D. Penn. Jan. 18, 1911), 184 Fed. 737, 738; Watson *v.* St. Louis, etc., R. Co. (C. C.). 169 Fed. 842; Taylor *v.* Southern R. Co. (C. Ct. N. B. Ga. April 23 1910), 178 Fed. 380, 382; Cain *v.* Southern R. Co. (C. C. E. D. Tenn. N. D. March 10, 1911), 199 Fed. 211.

It may be well to mention in this connection a point that has been fully gone into in a preceding part of this article, namely, that it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein, and the act is not to be invalidated because of this incidental and unavoidable effect upon intrastate transportation.[8] Neither is this act invalid because it results in establishing rules and measures of liability in cases to which it applies different from those which exist under the state laws in other cases arising from the relation of master and servant, nor because it gives the right of recovery, in case of the death of an employee, to different parties; but in cases to which it applies it is paramount and governs in the state as well as federal courts.[9]

Nor can it be said that it involves an interference by Congress with the distribution of an estate through the probate court of the state. The cause of action was created by Congress in the exercise of its power to regulate commerce among the several states, and it is elementary that in doing so it might determine who was entitled to maintain the same and for whose benefit. The administrator is not required thereby to institute proceedings; he may do so, and in that event can recover only for the benefit of the person entitled under the act to the damages.[10]

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8. Same—Where injury results from negligence of agency or employee engaged in intrastate commerce.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942. See, also, Zikos *v.* Oregon, R., etc., Co. (C. Ct. Wash. E. D. June 4, 1910), 179 Fed. 893, in which it was held that this point did not properly arise in the case, and that even if the statute should be held obnoxious in this respect, it was separable and valid in other respects.

9. Same—As establishing different rule and measure of liability from that existing under state law.—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

10. Same—As interfering with state powers with regard to distri-

As a Deprivation of Liberty or Property without Due Process of Law.—Long ago, in the Legal Tender Cases,[11] it was settled that the due process clause of the Fifth Amendment must be understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power, and that it does not inhibit, and has no bearing upon, laws that indirectly work harm and loss to individuals. Upon the same principle, it is held that neither the Act of June 11, 1906, nor the Act of April 22, 1908, is obnoxious to the due process clause of the Fifth Amendment, either in their general operation and effect,[12] or by reason of the effect of any special provision, such as that prohibiting any contract, rule, regulation, or device exempting the railroad company from the liability created by the act, whether considered with reference to future or existing contracts, rules and regulations,[13] or by reason of the

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bution of estates.—Bradbury *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 128 N. W. 1, 5.

11. 12 Wall. 457, 549, 551, 20 L. Ed. 287.

12. As a deprivation of liberty or property without due process of law.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (reversing 82 Conn. 352, 73 Atl. 754); Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 948; Missouri Pacific R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161; Snead *v.* Central of Ga. R. Co. (C. Ct. S. D. Ga., E. D. March 25, 1907, 151 Fed. 608; St. Louis, I. M. & S. Ry. Co. *v.* Conley (Cir. Ct. of App. Eighth Cir. Apr. 11, 1911), 187 Fed. 949; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141, affirming 148 Fed. 986, 997.

13. Same—Provision prohibiting contract, rule, regulation or device intended to defeat operation of act.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (reversing 82 Conn. 373, 73 Atl. 754, 762, and affirming 173 Fed. 494); Philadelphia, etc., R. Co. *v.* Shubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589; Oliver *v.* Northern Pac. R. Co. (D. C.), 196 Fed. 432, 434; Malloy *v.* Northern Pac. R. Co. (C. C.), 151 Fed. 1019, 1020; Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942, 948; St. Louis, etc., R. Co. *v.* Conley (C. C. A.), 187 Fed. 949.

The contention that the act violates the Fifth, Seventh, Tenth, and Fourteenth Amendments of the constitution is without merit. Kelley *v.* Great Northern R. Co. (C Ct. D. Minn. 5th Div. Mar. 11, 1907), 152 Fed. 211.

changes made in the existing rules of law with respect to fellow servants, contributory negligence, assumption of risk and the right to recover where the injury results in death, since there can, generally speaking, be no property or vested right in any rule of the common law.[14]

Equal Protection of the Laws—Arbitrary Classification. —In answering the contention that the Act of April 22, 1908, makes an unreasonable and arbitrary discrimination and operates to deny the equal protection of the law, it might have been sufficient for the court to have simply stated that the equal protection clause, upon which such objection was based, is found only in the Fourteenth Amendment, and is, in its terms, and by the uniform decisions of the Federal Supreme Court, prohibitive of state action only; but without resting its decision upon that ground, the court has held that the imposition of the liability created by the Act of April 22, 1908, upon interstate carriers by railroad only, and for the benefit of all their employees engaged in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed does not invalidate the act as making an arbitrary and unreasonable discrimination, even though it should be conceded, which is not decided, that the principle embodied in the due process of law guaranteed by the Fifth Amendment is broad enough to include, and extends to the prohibition of, any arbitrary classification or discrimination amounting to a denial of the equal protection of the laws.[15]

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14. Same—Provisions changing rules of law as to fellow servants, contributory negligence, and assumption of risk.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (reversing 82 Conn. 352, 73 Atl. 754); Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 948, citing Wilmington Mining Co. *v.* Fulton, 205 U. S. 60, 74, 51 L. Ed. 708, 27 S. Ct. 412, 417.

15. Equal protection of the laws—Arbitrary classifiction.—Second Employers' Liability Cases, 223 U. S. 1, 5 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494.

To the same effect, see Missouri, etc., R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161; Minneapolis, etc., Ry. Co. *v.* Her-

Rights, Privileges and Immunities of Citizenship.—The same observation might be made with regard to the contention that the act is in violation of the principle expressed in that clause of the Fourteenth Amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Besides, the privileges and immunities clause of the Fourteenth Amendment, as is well settled, only applies to those privileges and immunities "which arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the constitution of the United States," and not to those fundamental rights which are inherent in and belong to all who live under a free government. These latter privileges are "inherent in state citizenship, and are privileges or immunities of that citizenship only."[16] This question was very learnedly discussed in the case of Twinning *v.* New Jersey, in which Mr. Justice Moody analytically reviews the previous decisions of the supreme court on that subject.[17]

Who May Raise Constitutional Questions.—Under the old act of June 11, 1906, where the plaintiff alleged that he was

rick, 127 U. S. 210, 32 L. Ed. 109, 8 S. Ct. 1176; Chicago, etc., R. R. *v.* Pontius, 157 U. S. 209, 39 L. Ed. 675, 15 S. Ct. 585; Employers' Liability Cases, 207 U. S. 503, 52 L. Ed. 297, 28 S. Ct. 141; Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893, 904; Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 946.

A statute abolishing the fellow-servant rule, limiting its application to carriers by rail, is neither an arbitrary nor unreasonable classification. Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 947. Missouri Pacific Ry. Co. *v.* Mackey, 127 U. S. 206, 32 L. Ed. 107, 8 S. Ct. 1161; Minneapolis, etc., R. R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109, 8 S. Ct. 1176; Chicago, etc., R. R. Co. *v.* Pontius, 157 U. S. 209, 39 L. Ed. 675, 15 S. Ct. 585; Tullis *v.* Lake Erie & Western R. R. Co., 175 U S. 348, 351, 44 L. Ed. 192, 20 S. Ct. 136; St. Louis, etc., R. R. Co. *v.* Callahan, 194 U. S. 628, 48 L. Ed. 1157, 24 S. Ct. 857.

16. Rights, privileges, and immunities of citizenship.—Watson *v.* St Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 946.

17. Same.—Twining *v.* New Jersey, 211 U. S. 78, 97, 53 L. Ed. 97, 29 S. Ct. 14.

engaged at the time of the accident on a train engaged in interstate commerce, it was held that he was within the general rule of law that courts will not listen to an objection going to the constitutionality of an act by a party whose rights it does not affect in the particular case on trial.[18]

F. Construction of Acts.—By What Courts Construed.—The decision of the United States' Supreme Court upon the proper interpretation, construction, and effect of statutes regulating or affecting interstate and foreign commerce is conclusive upon all other tribunals when the same matters are called in question.[19]

Penal or Remedial—Strict or Liberal.—According to decisions rendered in several of the federal courts, the Act of April 22, 1908, particularly the first section thereof, being in derogation of the common law, is to be confined to its plain meaning; in other words, it is to be strictly construed, though not so strictly as to defeat the obvious intention of congress as found in the language actually used according to its true and obvious meaning.[20] Other courts, taking a more liberal view, hold that the act, while in derogation of the common law, is remedial and not penal in character, and should be liberally construed so as to prevent the mischief and advance the remedy.[21] This was the view taken of the earlier act in several decisions rendered thereunder,[22] and beyond question it is supported by the better rea-

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18. Who may raise constitutional questions.—Spain *v.* St. Louis, & S. F. R. Co. (C. Ct. E. D. Ark., E. D. March 13, 1907), 151 Fed. 522.

19. Construction of act—By what courts construed.—Rich *v.* St. Louis, etc., R. Co. (St. Louis Ct. App. Mo., July 2, 1912), 148 S. W. 1011, 1015.

20. Same—Penal or remedial—Strict or liberal.—Pedersen *v.* Delaware, L. & W. R. R. (C. Ct. E. D. Penn., Jan. 18, 1911), 184 Fed. 737, 739; Fulgham *v.* Midland Valley R. Co. (C. Ct. W. D. Ark. Ft. Smith Div., Feb. 19, 1909), 167 Fed. 660, 662, citing Johnson *v.* Southern Pac. R. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158.

21. Same—Same.—St. Louis, etc., R. Co. *v.* Conley (C. C. A.), 187 Fed. 949; Behrens *v.* Illinois, etc., R. Co., 192 Fed. 581.

22. Same—Same.—Spain *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. March 13, 1907), 151 Fed. 522, 529, citing Johnson *v.* Southern Pac. R. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158; Kelley *v.* Great Northern R. Co. (C. Ct. D. Minn. 5th Div. Mar. 11, 1907), 152 Fed.

son, for while the act undoubtedly is in derogation of the common law, yet as stated in one case, the elimination of the doctrine of fellow servants and the modification of the doctrines of contributory negligence and assumption of risk certainly makes for the betterment of human rights as opposed to those of property, and in the light of modern thought and opinion, the law should be as broadly and as liberally construed as possible.[23] As we shall hereafter see, the act has been broadly construed, so as to include within the scope of its operation every person whom congress could constitutionally include.[24]

Construction on Questions of Fellow Servants, Assumption of Risk, etc.—In determining who are fellow servants within the meaning of the act, the federal courts follow the rule of the Federal Supreme Court, and not the doctrines of the state courts.[25] Likewise, the question whether the injured employee assumed the risk is to be determined by construction of the whole statute under the rules laid down by the Federal Supreme Court.[26]

G. Operation of Act—1. Prospective or Retroactive.—While there are exceptions, especially in the case of remedial statutes, the general rule is that statutes are addressed to the future and not to the past; and, in the absence of explicit words to that effect, statutes are not retroactive in their application.[27] As the Act of 1908 introduced a new policy and radically changed

211 (distinguishing the Trade Mark Cases, 100 U. S. 82, 25 L. Ed. 550, and Illinois, etc., R. Co. *v.* McKendall, 203 U. S. 514, 51 L. Ed. 298, 27 S. Ct. 153).

23. Same—Same.—Behrens *v.* Illinois, etc., R. Co. (Dist. Ct. E. D. La. Dec. 30, 1911), 192 Fed. 581, 582.

24. Includes all persons whom congress could constitutionality include.—See post, "When Railroad or Employee Engaged in Interstate Commerce," III, G, 4.

25. Construction on questions of fellow servants, assumption of risk, etc.—Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893, 895, citing Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772, 13 S. Ct. 914.

26. Same.—Horton *v.* Seaboard Line R. Co. (N. C.), 78 S. E. 494.

27. Operation—Prospective or retroactive.—Winfree *v.* Northern Pac. R. Co., 227 U. S. 296, 57 L. Ed. —, 33 S. Ct. —, affirming 173 Fed. 65.

the existing law, permitting a recovery in cases where a recovery could not have been had before, and taking away defenses which theretofore were available, the courts hold that it is prospective only in its operation, and that the phrase "action hereafter brought," as used in § 3 does not apply to an alleged cause of action which accrued, if at all, before the statute was enacted.[28] The decisions rendered under the act of June 11, 1906, were to the same effect.[29]

2. Exclusive or Controlling Operation of Federal Act; Superseding State Law.—As to Carriers and Employees While Engaged in Interstate Commerce.—The laws of the several states are determinative of the liability of employees engaged in interstate commerce for injuries received by their employees while engaged in such commerce so long as congress, although empowered to regulate that subject, has not acted thereon, because the subject is one which falls within the police power of the states in the absence of action by congress.[30] The inaction of congress, however, in nowise affects its power over the subject, and where congress has acted, the laws of the states, in so far as they cover the same field, are superseded, since that which is not supreme must yield to that which is.[31]

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28. Same.—Winfree *v.* Northern Pac. R. Co., 227 U. S. 296, 57 L. Ed. —, 33 S. Ct. —, affirming (C. C. A.), 173 Fed. 65, which affirmed. 164 Fed. 698; Atchison, etc., R. Co. *v.* Mills, 53 Tex. Civ. App. 359, 116 S. W. 852.

29. Same—Same—Decisions under act of June 11, 1906.—Hall *v.* Chicago, etc., R. Co. (Cir. Ct. N. D. Iowa, Cedar Rapids Div. Dec. 19, 1906), 149 Fed. 564; Plummer *v.* Northern Pac. R. (C. Ct. W. D. Wash. W. D. Mar. 2, 1907), 152 Fed. 206.

30. Exclusive operation of federal act—Power of states in absence of congressional regulation.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606, 608; Chicago, M. & St. P. R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App.), 138 S. W. 1126, 1128; Missouri, etc., R. Co. *v.* Saddler (Tex. Civ. App.), 149 S. W. 1188; Missouri, etc., R. Co. *v.* Castle (C. C. A.), 172 Fed. 841.

31. Same—Powers of congress not affected by its inaction.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494; El

And what is true of the states applies with even stronger reason, of course, to territorial legislation, over which congress has direct control,[32] and to regulations based upon the common law as well as to those based upon statutes. Both are rules of conduct proceeding from the supreme power of the state, and the fact that one is unwritten and the other written can make no difference in their validity or effect.[33]

Applying these principles to the case in hand, the decided cases establish the proposition that actions by employees against railroad companies to recover for personal injuries sustained when both parties were engaged in interstate commerce at the time of the injury are governed by the Federal Employers' Liability Act of April 22, 1908, and that said act supersedes all other laws as to actions for injuries so sustained, and is controlling as to the character of the action, the party plaintiff, the jurisdiction in which it may be brought, the elements and measure of damages, and the persons entitled to the benefit of any sums that may be recovered. In short, as to injuries sustained by the employees of railroads engaged in interstate commerce, where both are engaged in such commerce at the time the injury is sustained, this act overlaps and covers all state and territorial legislation, as well as regulations based upon the common law, and is therefore exclusive.[34] Once conceded that the federal statute

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Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Geer (Civ. App. Dallas, June 22, 1912, rehearing denied Oct. 12, 1912), 149 S. W. 1178, 1180.

32. Same—As to territorial legislation.—El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 271; Cound *v.* Atchinson, etc., R. Co. (C. C.), 173 Fed. 527.

33. Same—Immaterial whether regulation based upon common law or statute.—Western Union Tel. Co. *v.* Commercial Milling Co., 218 U. S. 406, 54 L. Ed. 1088, 31 S. Ct. 59, affirming 151 Mich. 425, 115 N. W. 698; Cound *v.* Atchison, etc., R. Co. (C. C.), 173 Fed. 527.

34. Same—All state and territorial legislation superseded by act of April 22, 1908.—St. Louis, etc., R. Co. *v.* Seale, 57 L. Ed. 651, 652; St. Louis, etc., R. Co. *v.* Hesterly, 57 L. Ed. 703, reversing 98 Ark. 240, 135 S. W. 874; American R. Co. *v.* Didricksen, 33 S. Ct. 224, 225; Michigan, etc., R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; Missouri, etc., R Co. *v.* Wulf (U. S.), 33 S. Ct. 135; Bottoms *v.* St. Louis, & S. F. R. Co. (Cir. Ct. N. D. Ga. May 3, 1910), 179 Fed. 318;

is applicable, the state law is excluded by reason of the supremacy of the former under the national constitution.[35]

The fact that the state statute was enacted prior to the federal act and at a time when congress had not acted on the subject is not material, since, as stated, the power of congress over the subject is in no wise affected by its inaction.[36] And in a case arising under the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415, U. S. Comp. Stat., Supp. 1909, p. 1170) it was

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Kansas City, etc., R. Co. *v.* Pope (Tex. Civ. App.) [Nov. 9th 1912, rehearing denied Dec. 14, 1912], 152 S. W. 185; Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App.), 14 S. W. 841; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Walsh *v.* New York, etc., R. Co., 173 Fed. 494; Melzner *v.* Northern Pac. R. Co. (Sup. Ct. Mont.), 127 Pac. 1002; Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. Dist. Wash.), 196 Fed. 432; American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603; Bradbury *v.* Chicago, etc., R. Co. (Iowa), 128 N. W. 1, 5; Whittaker *v.* Illinois, etc., R. Co. (C. Ct. E. D. La. Jan. 24, 1910), 176 Fed. 130; Fulgham *v.* Midland Valley R. Co. (C. Ct. W. D. Ark. Ft. Smith Div. Feb. 19, 1909), 167 Fed. 660; Taylor *v.* Southern R. Co. (C. Ct. N. D. Ga. April 23, 1910), 178 Fed. 380; Cound *v.* Atchison, etc., R. Co. (C. C.), 173 Fed. 527, 531; Dewberry *v.* Southern R. Co. (C. Ct. N. D. Ga. Jan. 8, 1910), 175 Fed. 307; Rich *v.* St, Louis, etc., R. Co. (St. Louis Ct. App. Mo. July 2, 1912), 148 S. W. 1011; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762.

Act held to apply to Porto Rico.—That the Employer's Liability Act of April 22, 1908, does apply to Porto Rico, is plain, since it, on its face, it extends to the District of Columbia, the territories, the Panama Canal Zone, and other "possessions" of the United States. That it does extend to Porto Rico was expressly decided in American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S Ct. 603, and American R. Co. *v.* Didricksen, 33 S. Ct. 224, 225.

The question as to whether the safety appliance act extended to that island was reserved in the Birch Case, but expressly decided in the affirmative in American R. Co. *v.* Didricksen, 33 S. Ct. 224, 225.

35. Same—Conceding applicability of federal act supersedes state law.—Second Employers' Liability Cases, 223 U. S. 1, 53, 56 L. Ed. 327, 347, 38 L. R. A. (N. S.) 44, 32 S. Ct. 169; Michigan C. R. Co. *v.* Vreeland, 227 U. S. 59, 67, 57 L. Ed. 192, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Seale, 57 L. Ed. 651, 652; St. Louis, etc., R. Co. *v.* Hesterly, 57 L. Ed. 703, reversing 98 Ark. 240, 135 S. W. 874.

36. Immaterial that state law was enacted prior to federal act.—Rich *v.* St. Louis & S. F. R. Co., 148 S. W. 1011.

held that this principle operated to preclude the state, during the period between the date of that act and the time when, by its express terms, it should go into effect, from making or enforcing as to employees engaged in interstate commerce, or upon a train engaged in moving both interstate and intrastate traffic, a local regulation limiting hours of labor.[37] But the intention of congress to take control of the subject so as to invalidate existing state statutory regulations could not be inferred from the enactment of the act of June 11, 1906, since that statute, having been held to be an invalid exercise of the power of congress, was not a law for any purpose, but was as inoperative as if it had never been passed, and could neither confer a right or immunity nor operate to supersede any existing valid law.[38]

Since there has been some confusion of thought shown in the cases with regard to the precise effect of the federal law upon state and territorial enactments, it may be well to state, for the sake of accuracy, that the federal act does not operate to make state enactments void in the sense of rendering them unconstitutional. That is a term which would be applicable only in the event the states had no power to legislate upon this subject, even in the absence of congressional regulation. The true effect of the federal act, as specifically pointed out in several cases, is merely to suspend existing state legislation and render it inoperative during the time the federal act continues in force.[39] If, there-

37. **Power of state to enforce state law between time of enactment and time of taking effect of federal act.**—Northern Pac. R. Co. *v.* Atkinson, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160, reversing 53 Wash. 673, 102 Pac. 876, 17 Am. Cas. 1013.

38. **Same—Effect of act of 1906, on legislative power of state.**—Chicago, etc., R. Co. *v.* Hackett, 57 L. Ed. 581, distinguishing Northern Pac. Ry. Co. *v.* Washington, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160.

39. **State legislation merely suspended, not rendered void, by operation of federal act.**—Missouri, K. & T. Ry. Co. of Texas *v.* Saddler (Tex. Civ. App.), 149 S. W. 1188; Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App.), 138 S. W. 1126, 1128; Missouri, etc., R. Co. *v.* Castle (C. C. A.), 172 Fed. 841; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606; Jones *v.* Chesapeake, etc., R. Co. (Ct. App. Ky.), 149 S. W. 951.

fore, such federal act should be repealed, or should be declared unconstitutional, existing laws upon the statute books of the several states, which were not otherwise objectionable, would immediately become operative,[40] a result which was expressly declared to have taken place with regard to a law of Nebraska[41] upon the rendering of the decision in the First Employers' Liability Cases,[42] holding the Federal Act of June 11, 1906, to be unconstitutional, the latter act being construed, of course, as never having existed for any purpose.[43]

The Arkansas Cases.—In two separate cases that went to the supreme court of Arkansas it was held that the federal act is not exclusive in its operation, and that plaintiffs suing for injuries of this kind may proceed under either the state or federal statute;[44] the court being of the opinion that the federal act was not exclusive in the first case for the reason that there was no federal statute requiring interstate carriers to block switches,

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40. Same—Becomes operative upon repeal of federal act or decision declaring same unconstitutional.—Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App. Texarkana, June 1, 1911, rehearing denied June 29, 1911), 138 S. W. 1126, 1128; Missouri, etc., R. Co. *v.* Sadler (Tex. Civ. App. Dallas, June 29, 1912, rehearing denied Oct. 12, 1912), 149 S. W. 1188; Missouri, etc., R. Co. *v.* Castle (C. C. A.), 172 Fed. 841; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606.

Speaking of the effect of the federal act upon state legislation, the supreme court said, in a recent case: "It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until congress shall again remit the subject to the reserved police power of the states." Michigan Central R. Co. *v.* Vreeland, 33 Sup. Ct. Rep. 192, 194.

41. Same—Same.—Laws Neb. 1907, p. 191, c. 48, § 1,

42. Same—Same.—207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

43. Same—Same.—Missouri, etc., R. Co. *v.* Castle (C. C. A.), 172 Fed. 841; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606, 608. See, also, Chicago, etc., R. Co. *v.* Hackett, 57 L. Ed. 581, distinguishing Northern Pac. R. Co. *v.* Washington, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160.

44. The Arkansas decisions.—St. Louis, etc., R. Co. *v.* McNamare, 91 Ark. 515, 122 S. W. 102; St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark.), 135 S. W. 874.

frogs, and guard rails; it appearing that the deceased had come to his death through the failure of the defendant to block a frog or a guard rail.[45] In support of this ruling the court relied upon the case of Chicago, etc., R. Co., 86 Ark. 412, 111 S. W. 456, in which it was held that the Arkansas statute requiring railway companies to equip certain freight trains with at least three brakemen was not in conflict with nor superseded by any act of congress, which case was affirmed on writ of error to the supreme court of the United States in Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275.

In the second case, the action was brought by the personal representative of the deceased in the courts of Arkansas for death resulting from an injury sustained in Oklahoma by reason of a defective car in the freight train upon which deceased was a brakeman, and the court, after comparing the Oklahoma statute and the federal act, and holding that there was no conflict, then proceeded, after noticing the great weight of decided authority to the contrary, particularly the case of Fulgham *v.* Midland Valley R. Co. (C. C. W. Dist. Ark.), 167 Fed. 660, to hold that the remedy given by the Federal Act of April 22, 1908, is not exclusive, and that the plaintiff was entitled to proceed under the state law.[46] This case was reversed on a writ of error to the Federal Supreme Court, that court reaffirming the proposition that the federal act supersedes state laws in the matters with which it deals, and holding that it deals with the liability of carriers while engaged in commerce between the states for defects in cars.[47]

In view of the fact that the same section of the act (§ 1) deals with injuries arising from defects and insufficiencies in the track and road bed, as well as in cars, there is no doubt but that the decision in the first case[48] was also wrong, notwithstanding the

45. Same.—St. Louis, etc., R. Co. *v.* McNamare, 91 Ark. 515, 122 S. W. 102.

46. Same.—St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark.), 135 S. W. 874.

47. Same.—St. Louis, etc., R. Co. *v.* Hesterly, 57 L. Ed. 703, 704.

48. Same.—St. Louis, etc., R. Co. *v.* McNamara, 91 Ark. 515, 122 S. W. 122.

principle announced in the case of Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275.

As to Carriers and Employees While Engaged in Intrastate Commerce.—It is a well-settled principle that where the same instrumentality, as in the case of a railroad, is engaged in both intrastate and interstate transportation, it is subject to both state and federal regulation, and that the full control of each over the commerce subject to its dominion must be preserved.[49] It follows, therefore, that the Federal Employers' Liability Act of April 22, 1908, does not and could not supersede similar legislation by the states so long as the latter is made applicable only to injuries sustained while the employee was engaging solely in intrastate commerce, and that in such cases the action must be brought under the state law, whether statutory or the common law, and that all questions, such as proper parties plaintiff, the rules as to fellow servants, contributory negligence, and assumption of risk, the elements and measure of damages and the distribution of the same, will be determined by that law.[50]

Thus in Florida, where a right of action for wrongful death is given by statute, it was held under the Act of June 11, 1906, that an action might be brought to recover from a railroad company for the death of an employee occurring in that state in any case, and that whether the right of action was created by the state statute or by the Federal Employers' Liability Act (Act June 11, 1906, c. 3073, 34 Stat. 232, [U. S. Comp. St. Supp. 1907, p. 891]), was dependent upon whether the defendant was an interstate or wholly an intrastate carrier.[51] And in Texas where a railroad

49. As to carriers and employees while engaged in intrastate commerce.—Missouri, etc., R. Co. *v.* Larabee Flour Mills Co., 211 U. S. 612, 620, 53 L. Ed. 352, 29 S. Ct. 214; Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

50. Actions upon injuries arising in intrastate commerce determined by state law.—Hall *v.* Louisville, etc., R. Co. (C. C. N. Dist. Fla.), 157 Fed. 464; Missouri, etc., R. Co. *v.* Hawley (Tex. Civ. App.), 123 S. W. 726; Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App.), 138 S. W. 1126; Missouri, etc., R. Co. *v.* Saddler (Tex. Civ. App.), 149 S. W. 1188, 1192; Jones *v.* Chesapeake, etc., R. Co. (Ct. App. Ky.), 149 S. W. 951; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086.

51. Same.—Hall *v.* Louisville & N. R. Co. (Cir. Ct., N. D. Fla. Nov. 23, 1907), 157 Fed. 464.

section hand was thrown from a hand car and injured as the car was being propelled at a high speed over the section, because of a low and defective joint in the track, plaintiff not being engaged in any sense in interstate commerce, it was held that the Texas act of April 13, 1909 (Gen. Laws Tex. [1st Ex. Sess.] 1909, c. 10), providing that in case a railroad employee is injured by a defect in the track, among other things, contributory negligence shall not be an absolute defense, was applicable.[52] And where, in an action for injuries to a brakeman, plaintiff alleged that defendant owned and operated various lines of railroad, all within the state, and that when plaintiff was injured his run was between two terminal cities, and that the car from which he fell was being transported between such terminals, it was held that it sufficiently showed that defendant was then engaged in intrastate commerce only, and that his cause of action was governed by state laws, and not by the Federal Employers' Liability Act of April 22, 1908.[53]

Right to Recover under Either State or Federal Law—Pleading and Proof.—The federal courts are presumed to be cognizant, without pleading, of the Employers' Liability Act of April 22, 1908, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject.[54] Therefore in stating that the action must be brought and recovery had under the state law where the injury occurs in intrastate commerce, or under the federal act where the injury occurs in interstate commerce, it is not meant to say that the plaintiff must specifically plead or refer to the state statute in the one case, or to the federal act in the other, for, as we shall presently see, the proper procedure is to plead the facts, and a recovery may then be had according

52. Same.—Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App. Texarkana, June 1, 1911, rehearing denied June 29, 1911), 138 S. W. 1126.

53. Same.—Missouri, K. & T. Ry. Co. of Tex. *v.* Hawley (Ct. Civ. App. of Tex. Dec. 4, 1909), 123 S. W. 726. See, also, Missouri, etc., R. Co. *v.* Saddler (Tex. Civ. App.), 149 S. W. 1188, 1192; Railway Co. *v.* Neaves (Tex. Civ. App.), 127 S. W. 1090.

54. Right to recover under either state or federal law—Judicial notice of statute.—Missouri, etc., R. Co. *v.* Wulf, 33 S. Ct. 135.

as the evidence may develop a case under the one law or the other.[55]

But a reference to a state statute in the petition in an action which can legally rest only upon the Employers' Liability Act will not invalidate the pleading any more than would the mention of any other repealed statute.[56] If therefore, the plaintiff should specifically, but erroneously, base his action upon a state law which, under principles heretofore stated, must be regarded as superseded by the federal act, the court may treat as surplusage, and disregard, all reference to the state law, and if it should then appear, that, omitting all reference to the state law, and treating it as surplusage, the plaintiff has set forth facts showing a substantial cause of action under the controlling law, that is, under the federal act, and that the evidence is sufficient to support the same, the court may then administer the law as the court knows it to be, and render judgment under and in accordance with the federal act;[57] or it may permit the plaintiff to amend his pleading so as to bring himself within the act.[58]

Thus in the Georgia case cited, the action was brought in the Georgia courts upon a cause of action arising in Alabama, and the plaintiff specifically based his case upon the Alabama statute, it otherwise appearing, however, from the petition, and afterwards from the evidence, that the injury was sustained while the employee was engaging in interstate commerce, and that the case was therefore controlled by the federal act. The defendant

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55. Same—Unnecessary to plead the statute—Plaintiff to plead the facts.—Missouri, etc., R. Co. *v.* Wulf, 33 S. Ct. 135; Ullrich *v.* New York, etc., R. Co. (D. C.), 193 Fed. 768; Jones *v.* Chesapeake, etc., R. Co. (Ct. App. Ky.), 149 S. W. 951, 953; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086; St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark.), 135 S. W. 874.

56. Same—Effect of erroneous plea or reference.—Missouri, etc., R. Co. *v.* Wulf, 33 S. Ct. 135; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086, 1089.

57. Same—Same—Court to give judgment under state or federal law as case may warrant.—Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086, 1089; Missouri, etc., R. Co. *v.* Wulf, 33 S. Ct. 135, 137.

58. Same—Same—Court may permit amendment.—Missouri, etc., R. Co. *v.* Wulf, 33 S. Ct. 135, 137.

attempted to interpose this objection in an amendment to its answer, which amendment was ruled out on the ground that it was in substance and effect a dilatory plea, going not to the merits of the action, but merely seeking to show that the plaintiff's right to recover was dependent, not upon the statute set forth, but upon another statute, namely, the Federal Employers' Liability Act, and should therefore have been offered at the appearance term of the court. In this, the Court of Appeals held that there was no error, or none of which the defendant could complain, since the Alabama statute was more favorable to it than the federal act, and that since the petition was sufficient, after omitting as surplusage all reference to the Alabama statute, to make out a case under the federal act, and the evidence being plainly sufficient to demand a verdict for the plaintiff under that act, it was the duty of the judge to administer the law in accordance therewith, and that there was no error in submitting the case and rendering judgment for the plaintiff as though the action had been specifically brought under the federal act.[59]

The thing which can not be done is to award judgment under and in accordance with the principles of the state law where the evidence, as developed at the trial, shows that the cause of action arose in interstate commerce. This is what the Arkansas court attempted to do in the Hesterly Case, which was reversed on writ of error to the Federal Supreme Court.[60]

Complications arising in such cases out of the fact that the statute under which the action should have been brought required that the plaintiff should have sued in a different capacity, or that the action should have been brought by a different party plaintiff or for the benefit of different persons, will be discussed hereafter.[61]

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59. Same—Same—When objection treated as dilatory plea—Time of filing.—Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086, 1089. See, also, St. Louis, etc., R. Co. *v.* Seale, Adv. Sheets, 57 L. Ed. 651; St. Louis, etc., R. Co. *v.* Hesterly, Adv. Sheets, 57 L. Ed. 703. And see post, "Plea or Answer," III, H, 7.

60. No recovery under state law where evidence shows case arising in interstate commerce.—St. Louis, etc., R. Co. *v.* Hesterly, Adv. Sheets, 57 L Ed. 703, 704, reversing 98 Ark. 240, 135 S. W. 874. See, also, St. Louis, etc., R. Co. *v.* Seale, Adv. Sheets, 57 L. Ed. 651, 653.

61. Where plaintiff sues in wrong capacity, or action brought by

3. Contract, Stipulation, or Device Intended to Defeat Operation of Statute.—Section 5 of the Act of April 22, 1908, expressly provides that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void," with a proviso permitting the carrier to set off any sum of money, insurance or relief benefit it may have paid to the injured employee, or the person entitled thereto, on account of the injury or death for which the action is brought. This provision of the act has been variously attacked as being opposed to the due process clause of the Fifth Amendment, but there can be no question that the power to enact such legislation carries with it the power to prohibit any contract or device the purpose and intent of which is to waive, modify, evade, or in anywise thwart the purpose of the act by relieving the employer of his liability thereunder. This provision of the act is not unconstitutional, therefore, as infringing the liberty of contract guaranteed by the Fifth Amendment.[62]

And as applied to existing contracts, rules or regulations, the supreme court of the United States holds, with unanswerable logic, that the power of congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, is not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy; that to subordinate the exercise of the federal authority to the continuing operation of previous contracts would be to place, to that extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of con-

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wrong person.—See post, "To Whom Given," III, H, 1, b; "For Whose Benefit," III, H, 1, c; "Party Plaintiff," III, H, 5.

62. Contract—Stipulation or device intended to defeat operation of statute—Constitutionality—Liberty of contract.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494; Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589; Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash.), 196 Fed. 432, 434; Malloy *v.* Northern Pac. R. Co. (C. Ct. W. D. Wash), 151 Fed. 1019, 1020.

gress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements; that the constitution recognizes no such limitation, and that it is of the essence of the delegated power of regulation that, within its sphere, congress should be able to establish uniform rules, immediately obligatory, which, as to future action, shall transcend all inconsistent provisions. Prior arrangements, therefore, are necessarily subject to this paramount authority.[63]

Not only is this principle to be deduced from the nature of the power itself, but it results also from the fact that the prohibition against the impairment of the obligation of contracts is not a restriction upon the powers of congress, and that the due process clause of the Fifth Amendment is held not to apply to incidental loss or injury arising from the operation of law, but only to those cases in which there is a direct taking or appropriation of property.[64] Existing as well as future contracts contravening the terms of this section fall under its condemnation, therefore, and must be held to have been entered into with the full knowledge and understanding that congress might at some future time so exercise the power vested in it as to render the same invalid.[65] The same principle has been applied in the case of existing contracts contravening the prohibitions of the Interstate Commerce Act, as well as in other cases, and as the principle is a general one those cases are equally applicable here.[66]

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63. Constitutionality as applied to existing contracts and arrangements.—Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589.

64. Same—Applicability of impairment clause—Incidental injuries not covered by Fifth Amendment.—Legal Tender Cases, 12 Wall. 457, 549, 551, 20 L. Ed. 287; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (reversing 82 Conn. 373, 73 Atl. 754, 762); Watson *v.* St. Louis, etc., R. Co. (C C. E. D. Ark.), 169 Fed. 942, 948; Missouri, etc., R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161; Snead *v.* Central R. Co. (C. Ct. S. D. Ga.), 151 Fed. 608; St. Louis, etc., R. Co. *v.* Conley (C. C A. 8th Cir.), 187 Fed. 949.

65. Same—Contracts made subject to future exercise of power by congress.—Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

66. Principle general in its application—Interstate commerce cases.

This section of the act operates to prevent a railroad company from setting up as a defense a release of damages for injury or death, which release, independently of the statute, would be a full and complete defense to the action;[67] and also invalidates a stipulation in an existing contract of employment making the acceptance of benefits under a contract of membership in a railway relief department equivalent to a release of damages for the death or injury on account of which received.[68] It is held also to apply to implied as well as to express contracts and agreements, and any special defense predicated upon an implied contract of this character must fail.[69]

HOMER RICHEY.

(TO BE CONTINUED.)

—Atlantic Coast Line R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A. (N. S.) 7; Baltimore, etc., R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621; Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265; Chicago, etc., R. Co. *v.* McGuire, 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259; Armour Packing Co. *v.* United States, 209 U. S. 56, 81, 52 L. Ed. 681, 28 S. Ct. 428; New York, etc., R. Co. *v.* United States, No. 2. 212 U. S. 500, 505, 53 L. Ed. 624, 29 S. Ct. 309; American Express Co. *v.* United States, 212 U. S. 522, 533, 53 L. Ed. 635, 29 S. Ct. 315; Legal Tender Cases, 12 Wall. 457, 549, 551, 20 L. Ed. 287.

67. Forbids setting up release of damages as a defense.—Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash. N. D. Feb. 5, 1912), 196 Fed. 432, 434.

68. Invalidates stipulation for release through acceptance of benefits.—Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589.

69. Applies to implied as well as express agreements.—Malloy *v.* Northern Pac. Ry. Co. (C. Ct. W. D. Wash. March 5, 1907), 151 Fed. 1019, 1020.